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Supreme Court of the United States

October Term, 1964

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S ANSWERING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Statement of the Case

Respondent accepts the statement of facts set forth in Pages 4 through 12 of the Petition with the following exceptions:

The Tug MONTANA took the position she did on the starboard bow of the Str. DETROIT EDISON so that she could see down the side of the DETROIT EDISON and keep the dock to which she was convoying the vessel in sight at all times.

With respect to the statement that the master of the Str. DETROIT EDISON never relayed information from his stern lookout to the tug, the evidence showed that the

MONTANA had the dock in sight at all times and there was no need for the Steamer to convey any information to the tug.

The engineers of the DETROIT EDISON had been watching the approach to the dock through the gangway and had anticipated the need for emergency full ahead power. Consequently, there was a continuous rise in the R. P. M.'s as shown on her pilot house tachometer from the time the master of the DETROIT EDISON first signaled full ahead to the time the propeller of the Steamer was turning over at better than 100 revolutions per minute. There was no delay in the resulting ahead power of the Steamer as suggested by Petitioner.

The Issues and Holdings Below

Two distinct issues were litigated in the District Court, namely, the issue of Petitioner's liability for negligent towage and the legality of Petitioner's tariff.

The District Court made remarkably detailed and complete Findings of Fact in support of its conclusion that the subject accident resulted solely from the negligence of Petitioner's Tug Montana. The Findings of the District Court were attacked by Petitioner in the Seventh Circuit, but the Court of Appeals has affirmed the District Court on the issue of liability noting (333 F. 2d 426 at 428):

> "* * * We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. *McAllister v. United States*, 348 U. S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954), *United States v. M/V Martin*, 313 F. 2d 851, 852 (7th Cir. 1963). The conclusion based on the findings is not erroneous."

The Petition raises no new or novel issue of law pertinent to the facts relative to the issue of liability.

The view of the Court of Appeals reversing the District Court and holding Petitioner's tariff invalid is in complete accord with the opinions of this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85 (1955); *Boston Metals Company v. S/S "Winding Gulf"*, 349 U. S. 122 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U. S. 697 (1963).

Actually the question presented to the Court of Appeals on the tariff issue was whether the Petitioner could accomplish precisely what this Court said it could not do by the semanticism of labeling exculpatory clauses a "limitation." The Court of Appeals, without disturbing any Findings by the District Court and after review of the record, has held the clauses violate the

> "* * * policy reasons underlying the *Bisso* decision—'(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains,' 349 U. S. at 91, 75 S. Ct. at 632 and the consideration of commercial certainty called for by Justice Harlan in *Dixilyn* * * * even though the tariff provisions before us limit, rather than exclude, liability." (333 F. 2d at 430.)

ARGUMENT

QUESTION I

The alleged direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and the decisions of the United States Court of Appeals for the Sixth Circuit refers to decisions of the Sixth Circuit made before the law of towage was settled by this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85 (1955). There is therefore, no direct conflict.

The Sixth Circuit actually considered the legality of Petitioner's tariff limitation pertaining to demurrage in 1922. *Hand & Johnson Tug Line v. Canada S. S. Lines, Ltd.*, 6 Cir., 1922, 281 Fed. 779 at 783, 784. Eleven years later, the same Court was called upon not to explore the legality of the demurrage limitations provision of Petitioner's tariff in depth, but to determine whether expenses for wages, food and fuel during a period of detention came within the purview of demurrage rather than special damages. *Great Lakes Towing Co. v. Bethlehem Transp. Corporation*, 6th Cir. 1933, 65 F. 2d 543. It is obvious, then that the legality of demurrage limitation has not been thoroughly considered for 42 years prior to the decision of the Court of Appeals for the Seventh Circuit in this case.

This Court heard the *Bisso* case in 1955 for the purpose of resolving conflicts between the several circuits with respect to towage liability limitation clauses. The decision in *Bisso* clearly enunciated a public policy striking down any form of limitation clause in a towage contract. Such a rule of public policy neces arily repudiated and overruled the decision of the Sixth Circuit made 33 years earlier in the *Canada Steamship* case.

QUESTION II

The decision of the Court of Appeals in this case is in complete accord with the decisions of this Court.

This Court is familiar with the protracted efforts of the towing industry to avoid the consequences of tug negligence by contract of towage. A broad public policy was set forth by this court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85, 99 L. Ed. 911, 75 S. Ct. 629 (1955) prohibiting a tugboat from contracting out of the consequences of its own negligence. Adjusting its cap to fit the circumstances, Petitioner, The Great Lakes Towing Company, brought forth a new tariff in 1956 arbitrarily placing a limit upon its liability for negligent towage of $1.000.00, offering in return a rate escalation option for increased liability. Upon adequate evidence, the Courts below have found that the token amount of $1,000.00 bore no reasonable relationship to damages ordinarily resulting from tug—steamboat disasters and that the escalation option was never used in Lake custom and practice. The limitation is, and was viewed by the Courts below as tantamount to exculpation.

Examination of Respondent's tariff (Exhibit 11c, set forth in the Appendix Pgs. 428-434) reveals a comprehensive scheme to avoid the consequences of tug negligence not only in situations covered by the tariff provisions here under scrutiny, but also in virtually every other type of tug operation except the most simple movements of a vessel under tow. Quite obviously, then, the 1956 revision of Article 16 was an effort to avoid the public policy mandated by this Court in *Bisso*.

The public policy defined by this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85, 99 L. Ed. 911, 75 S. Ct. 629

(1955) and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U. S. 697, 10 L. Ed. 2d 78, 83 S. Ct. 967 (1963) is predicated upon three pre-eminent factors, to wit: the discouragement of negligence on the part of the tower; protection of the tow from overreaching conduct on the part of the tower; and certainty of commercial transactions.

Enforcement of Article 16 can in no way discourage tug negligence. Fundamentally, the tug is liable only for its own negligence. If no increased rate is paid, there is absolutely no incentive for the towing company to exercise due care. If the steamboat company pays an increased rate under the options available to it, Petitioner is still only responsible for its own negligence (but only to the extent the rate increase has increased the limitation schedule of the tariff). No matter how much the rate is increased under the option afforded under Article 16, the Petitioner accepts no greater responsibility. It does not become an insurer, it does not become a bailee, it does not even accept the high degree of responsibility exacted of a common carrier.

At least since 1914 Petitioner has had a virtual monopoly on harbor towing in all major ports of the Great Lakes. *United States v. Great Lakes Towing Co. et al.*, DCND Ohio, 208 Fed. 733; Findings of Fact #8 and #9, A. 415. While it is obliged to serve all customers by the continuing injunction issued by the Federal Court in Cleveland in 1914, the absence of competition and the fact that Petitioner's tariff is subject to no review by any regulative body puts its customers completely at Petitioner's mercy.

In the case at bar, there was a large, unwieldy steamship in need of assistance in confined water. There were

no arms length negotiations leading to the towage contract as there were in *Dixilyn*, and Respondent had no choice of tug service. The plain fact of the matter is that Petitioner dictated the terms of the towage contract some two years prior to the accident of May 23, 1961 on a "take it" or "leave it" basis (See Exhibits 11c, 12c, 12b and 12a set forth at Pgs. 428-436 of the Appendix). This we submit is a classic example of overreaching on the part of the Petitioner.

The options afforded by Petitioner's tariff forced upon Respondent two impossible decisions. First of all the Respondent vessel owner had to determine in advance when an accident would happen and second, the amount of damage and delay that would be sustained in the accident.

There was considerable proof in the District Court showing the great variations with respect to damages in this type of accident demonstrating the futility of attempting to guess in advance the amount of increased "limitation" which should have been purchased from Petitioner. As the Court of Appeals noted in this case:

> "* * * there is no commercial 'certainty' as the escalation provision has little meaning where the owner cannot anticipate the measure of damages to its vessel, and make a judgment about higher valuations and rates accordingly." (333 F. 2d at 430.)

In *Southwestern Sugar & Molasses Co. v. River Terminals Corporation*, 360 U. S. 411, 3 L. Ed. 2d 1334, 79 S. Ct. 1210 (1959) this Court did not get to the question of legality of the exculpatory clause, but rather indicated that the matter should be first passed upon by the I. C. C. in an appropriate form of proceeding (Pg. 421 of 360 U. S.). In this case Petitioner's tariff is subject to no administrative review, but is unilaterally conceived and imposed by

Petitioner. We submit, therefore, that Petitioner's reliance on *Southwestern Sugar* is misconceived.

QUESTION III

Petitioner cites no authority to support its contention that a non-regulated monopoly such as the Great Lakes Towing Company is entitled to any special consideration with respect to the basic rules of liability.

The status of the Petitioner is unique. It has been determined to be a monopoly and continues in business at the pleasure of the Courts. *United States v. Great Lakes Towing Company*, DCND Ohio, 208 Fed. 733 (1913); DCND Ohio 217 Fed. 656 (1914). There was no other tug service available to Respondent's steamer DETROIT EDISON (Finding of Fact #8, A. 415). Petitioner, therefore, commanded the market as completely as any common carrier could have. Yet the scope of regulatory protection afforded to shippers under the Interstate Commerce Act, The Federal Communications Act or the Civil Aeronautics Act is entirely foreign to the Great Lakes shipping industry where vessel operators are left at Petitioner's mercy without recourse against the unilaterally conceived terms and conditions of Petitioner's tariff. Nor may Petitioner's business of harbor towing be equated to the business of carrying goods for hire. Under the settled law of towage, Petitioner never becomes a bailee of the tow and its obligations to the tow arise from the law of torts rather than the law of contracts. *Stevens v. The White City*, 285 U. S. 195, 76 L. Ed. 699, 52 S. Ct. 347 (1932); *The Brooklyn*, 2 Ben. 547, Fed. Case No. 1938 (1868); *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382, 12 Wall. 167 (1871); *American Bridge Division U. S. Steel Corp. v. Roen Steam-*

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The attempt to confuse the applicable law governing carrier rate structure with the basic laws of towage is not original with this Petitioner. A similar campaign was pursued by the tug owner in *Mississippi Valley Barge Line Company v. T. L. James & Co.,* DC La. 1956, 144 F. Supp. 662. In the *James* case, the barge line company as owner of a towboat had issued a bill of lading to James as charterer of a barge to cover the transportation of heavy equipment in a tow on the Mississippi River. The barge sank as a result of negligent towage. The barge line company defended on the grounds that it was a certificated carrier and that its tariff, filed with I. C. C., exonerated it from liability for negligence. Judge Wright perceptively observed (144 F. Supp. 663):

> "This litigation presents a valiant but unsuccessful attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability for negligence clauses in towage contracts. * * *"

Judge Wright then went on to discuss the problem at hand saying at Pages 666-667:

> "The history of the fight of the common carrier to relieve itself of the stringent liability imposed by the common law is well known. The history of the fight to exempt towage from common carrier liability is likewise well known. Unsuccessful in their attempt to obtain judicial approval for release from liabil-

ity clauses in their carriage contracts, the carriers persuaded the Congress to pass the Harter Act in 1893. With reference to towage contracts, the Supreme Court in 1955, having previously exempted the tower from carrier liability, after backing and filling for many years, finally and definitively held that release from liability for negligence clauses in towage contracts are illegal as against public policy. Bisso v. Inland Waterway Corp., *supra*. Adjusting its cap to fit the change in circumstances, Mississippi Valley maintains that the contract of towage in suit is a contract of common carriage after all, and that as such it is entitled to the protection of Section 3 of the Harter Act as well as the release from liability provisions of its tariff filed with the Commission pursuant to the Interstate Commerce Act.

The carrier's contention is in the teeth of the opinion of the Supreme Court in Cornell Steamboat Co. v. United States, 321 U. S. 634, 64 S. Ct. 768, 88 L. Ed. 978. * * * A study of the Cornell Steamboat litigation through the Commission, the district court, and the Supreme Court leaves no doubt that while a carrier engaged in towage may be required to be certificated under the Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with reference to towage."

In affirming, Judge Hutchinson, speaking for the Fifth Circuit (1957, 244 F. 2d 263) said at Page 267:

"* * * we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took. * * * (the facts) not only tends strongly we think to support but also to compel the view that the parties were contracting not for afreightment but for a towage service and that the district judge was right in so holding."

This Court denied a petition for certiorari, 355 U. S. 871, 2 L. Ed. 2d 76, 78 S. Ct. 121.

The fundamental distinction between Petitioner's authorities pertaining to transportation services subject to regula-

tion and its own peculiar status was alluded to by this Court in *Southwestern Sugar* at Pages 416-417 of 360 U. S. where Mr. Justice Harlan said:

> "We think * * * the true question here presented, which *is whether considerations of public policy* which may be called upon by courts to strike down private contractual arrangements between tug and tow *are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body.* In Bisso the clause struck down was part of a contract over the terms of which the I. C. C., the body primarily charged by Congress with the regulation of the terms and conditions upon which water carriers subject to its jurisdiction shall offer their services, had no control * * *
>
> In these circumstances we would be moving too fast were we automatically to extend the rule of Bisso to govern the present case. For all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the towboat owner of the expense of insuring itself against liability for damage * * * and is a reasonable rate so computed. If that were so, it might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance with knowledge that the towboat may be required to respond in damages * * * despite agreement to the contrary. *For so long as the towboat's rates are at all times subject to regulatory control, * * * the possibility of an overreaching whereby the towboat is at once able to exact high rates and deny the liabilities which transportation at such rates might be found fairly to impose upon it can be aborted by the action of the I. C. C.* The rule of Bisso, however applicable where the towboat owner has 'the power to drive hard bargains', may well call for modification when that power is effectively controlled by a pervasive regulatory scheme." (Emphasis Ours.)

QUESTION IV

The issue of liability was essentially a question of fact which was determined adversely to petitioner in the District Court and affirmed by the Court of Appeals. No new authority or proposition of law has been cited by petitioner.

Petitioner apparently no longer challenges the findings of fault against its tug Montana. With respect to the Detroit Edison, the District Court both found and concluded:

> "That the Steamer Detroit Edison fulfilled all of its obligations in the joint venture and at all times material exercised reasonable care and maritime skill which prudent navigators employ in the same or similar circumstances." (Finding of Fact #34, Conclusion of Law #4, A. 392-393.)

The Court of Appeals duly noted:

> "* * * We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. * * *" (333 F. 2d at 428.)

The law of negligent towage is well settled. In the absence of new authorities the issue of contributory fault on the part of the DETROIT EDISON at best only raised questions of fact which were properly determined by the Trial Court. *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6, (1954).

Petitioner's arguments seeking to equate the alleged failure of the bow lookout of the DETROIT EDISON with statutory fault and complaint of failure to relay information from the stern lookout were thoroughly briefed in the Court of Appeals both on the cross appeal and petition for rehearing. It is, of course, axiomatic that even if there was a failure of lookout in any respect, there was still a ques-

tion of fact for the Trial Court to determine whether such failure was causally related to the disaster. *Hess Tankship Company v. S. S. M. L. Gosney*, DC Vir. 1963, 230 F. Supp. 1. Actually, the evidence established beyond peradventure of doubt that Petitioner's Tug Montana had the dock to which she was convoying the DETROIT EDISON in plain view at all times and there was absolutely nothing important that the DETROIT EDISON could have told her which she should not already have known. See *Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch & Co., Ltd.*, 4 Cir. 1963, 301 F. 2d 59; *Continental Oil Company v. M. S. Glenville*, DC Tex. 1962, 210 F. Supp. 865. Furthermore, Respondent relies on many of the same authorities in both the Courts below that Petitioner now advances as reasons for granting further review.

We submit that the conclusions of the District Court and the opinion of the Court of Appeals are in complete accord with all of the authorities relied upon by Petitioner. Only the facts vary and Petitioner has twice failed in its burden of establishing facts which would condemn the DETROIT EDISON in this disaster.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted.

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